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No. 90-50

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ELLIS GREGORY, JR. and ANTHONY P. NUGENT, JR., Judges,
Petitioners,

VS.

JOHN D. ASHCROFT, Governor of the State Missouri,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONERS

THOMAS J. GUILFOIL
JIM J. SHOEMAKE
BRUCE DAYTON LIVINGSTON
Counsel of Record
Guilfoil Petzall & Shoemake
100 North Broadway, Suite 2000
St. Louis, Missouri 63102
(314) 241-6890

Attorneys for Petitioners

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

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REPLY BRIEF FOR THE PETITIONERS

In response to the Brief For The Petitioners, respondent Governor Ashcroft and various amici argue that the Age Discrimination in Employment Act ("ADEA") does not apply to state court judges, and that the mandatory retirement of those judges is not unconstitutional. Among the reasons advanced by the Governor to support those positions are that petitioners are exempted from coverage under the ADEA either as "appointee[s] on the policymaking level" or as persons "elected to public office"; that Congress did not make a sufficiently clear statement of its intent to apply the ADEA not only to the states, but to judges particularly; that application of the ADEA to state court judges violates the Tenth Amendment and general principles of federalism; and that Missouri's arbitrary discrimination against all

of its judges age seventy or above is rational and therefore not in violation of the Equal Protection Clause of the Fourteenth Amendment.

Each of these points is without merit. We address those points in order, to the extent that they require further explication beyond that set forth in the Brief For The Petitioners.

I. THE "APPOINTEE ON THE POLICYMAKING LEVEL" EXEMPTION FROM ADEA COVERAGE DOES NOT APPLY TO APPOINTED STATE JUDGES.

Respondent barely addresses the main thrust of petitioners' argument that the "appointee on the policymaking level" exemption applies "only to persons who advise or work closely with the elected official that chose the appointees." Brief For The Petitioners at 17-18. *See* Brief For The Respondent at 14-15. Insofar as respondent addresses the argument, he does so based on a mis-paraphrased version of the statute, *id.* at 15, and thus reaches the incorrect conclusion that petitioners' construction of the statute renders the policymaking exemption redundant.

To avoid petitioners' argument that the exemptions from ADEA coverage in 29 U.S.C. § 630(f) include only elected officials and persons who work closely with such officials, respondent significantly mischaracterizes the last exemption, that for an "immediate adviser." Respondent states that the last exemption relates to an "advisor with respect to the exercise of the constitutional or legal powers of *an* office," Brief For The Respondent at 15 (emphasis added), rather than "*the* office" of the person who appointed the adviser in the first place. *See* 29 U.S.C. § 630(f). Thus, the exemptions relate to a person elected to public office and three kinds of persons who were appointed by that official — the first and third of whom unquestionably work closely with that elected officer: persons on the official's personal staff and immediate advisers with respect to the exercise of constitutional and legal powers of the appointing authority's office.

Thus, contrary to respondent's mis-paraphrased version of the exemptions, the "appointee on the policymaking level" exemption is indeed "sandwiched" between other persons who are also appointed or selected by an elected official and who work closely with or for that elected official. Petitioners reaffirm that their construction of the policymaking level exemption — requiring the same close working relationship with the appointing elected official — best fits both the structure of § 630(f) as well as the legislative history.

Thus interpreted, the "appointee on the policymaking level" exemption does not become "entirely redundant." *See* Brief For The Respondent at 15. It would apply to cabinet style appointees, such as the secretaries of HUD, HHS, or the Department of Labor — persons who would not fall into the personal staff or immediate adviser exemptions.

Moreover, this Court has previously construed a nearly identical series of exemptions in the same manner as advocated by petitioners. *National League of Cities v. Usery*, 426 U.S. 833 (1976) evaluated the constitutionality of Congress' extension of the Fair Labor Standards Act ("FLSA") to the states by amendment in 1974. 426 U.S. at 836. Like the ADEA, the FLSA generally defines any "employee" as any individual employed by an employer. *Compare* 29 U.S.C. § 203(e)(1) *with* 29 U.S.C. § 630(f). Thus, under the FLSA an individual employed by a state is a defined "employee" unless that employee is not subject to the civil service laws of the state, *and*

> (I) holds a public elective office of that state, political subdivision, or agency,
>
> (II) is selected by the holder of such an office to be a member of his personal staff,
>
> (III) is appointed by such an officeholder to serve on a policymaking level, or
>
> (IV) who is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office.

29 U.S.C. § 203(e)(2)(c) (1970 ed., supp. IV). These exemptions are substantively, if not literally, identical to those in the ADEA definition of "employee."

In *National League of Cities*, then Justice Rehnquist described these exemptions as "excluding from the Act's coverage those individuals holding public elective office or *serving such an officeholder* in one of several specific capacities." 426 U.S. at 839 (emphasis added). This is precisely the interpretation urged by petitioners with respect to the nearly identical provision in the ADEA. *See* Brief For The Petitioners at 16-21. Petitioners, as independent judges, do not serve the elected official who appointed them. *See id.* at 24-26. This Court's prior construction of the nearly identical provision in the FLSA confirms that petitioners' interpretation and construction of the ADEA exemption is correct.

Respondent and several amici cite a footnote in an EEOC opinion letter and completely ignore the discussion in the remainder of the letter on the applicability of the ADEA to appointed state court judges. Brief For The Respondent at 32; Brief of the National Governors' Association, Counsel Of State Governments, et al. As Amici Curiae at 4 (hereinafter "Brief Of National Governors' Association"); Brief Of Amicus Curiae The Washington Legal Foundation at 18-19 (hereinafter "Brief Of Washington Legal Foundation"). *See* EEOC Opinion Letter to Rep. Claude Pepper dated April 7, 1987, *reprinted in* EEOC Compliance Manual at N:1001 (BNA) (hereinafter "EEOC Opinion Letter"). Respondent thus fails to apprise the Court of the EEOC conclusion that appointed judges are not "on the policymaking level" within the meaning of the ADEA: "[T]he Commission believes that *state court judges who are appointed to their positions would not come within the meaning of any of the narrow exclusions from coverage contained in the ADEA definition of the term 'employee'.*" EEOC Opinion Letter at N:1001. One of the amici concedes the deference that is due the EEOC. Brief Of The Washington Legal Foundation at 18 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 580 n.17 (1942)).

For the reasons set forth in the Brief For The Petitioners and based upon the interpretation of the nearly identical FLSA exemption by this Court in *National League of Cities*, petitioners submit that the "appointee on the policymaking level" exemption has been properly construed by the EEOC:

> This exception for policymaking level appointees, like the ones for certain personal and immediate advisers on the constitutional or legal powers of an office, requires a close personal and immediate relationship between the elected official and the appointee. It covers only the first line of advisers upon whom the elected official directly relies for advice.

EEOC Opinion Letter at N:1001. Therefore, the "appointee on the policymaking level" exemption does not apply to petitioners and other appointed state court judges who are independent of the official who appointed them.

II. APPOINTED "MISSOURI PLAN" JUDGES ARE NOT "ELECTED TO PUBLIC OFFICE" WITHIN THE MEANING OF THE ADEA EXEMPTION.

Respondent contends that petitioners are "elected to public office" because they must stand for a "retention election." Brief For The Respondent at 31-33. Respondent's contention ignores the statute's plain language, Brief For The Petitioners at 13, the limitations and procedures governing judicial retention questions under Missouri law, *infra* at 7, and the conclusion by Judge Hungate of the district court that "Missouri Plan" judges are *appointed* and *not elected* to public office. Petition at A-20 n.3; Brief For The Petitioners at 13-14.

Respondent cites a footnote in the 1987 EEOC Opinion Letter in an attempt to establish that a retention election makes an appointed judge "elected to public office" within the meaning of the ADEA exemption. Brief For The Respondent at 32. Respondent entirely ignores, however, the EEOC's more recent and more specific position that the "elected to public office" exemption does not apply to appointed Missouri Plan judges who are subject to retention, as evidenced by the EEOC's issuance of a Letter of Violation to the state of Missouri. *See*

Letter to Judge William L. Hungate from Richard W. Schuetz, EEOC Enforcement Manager, dated April 7, 1989 (summarizing the EEOC's investigation of Missouri's retirement of state court judges in response to an inquiry from Judge Hungate).[1]

Thus, the EEOC has taken inconsistent positions with respect to the effect of retention elections upon the status of appointed state court judges under the ADEA. The thoroughness, validity and consistency of an agency's reasoning are factors that bear upon the amount of deference to be given the agency interpretation. *Federal Election Commission v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). *See also United States v. Clark*, 454 U.S. 555, 565 (1982) (agency's construction of statute entitled to special deference when consistent over long period of time). The conclusion in the EEOC Opinion Letter, that appointed judges who are subject to retention elections are exempted from the ADEA as persons "elected to public office," has not been consistently applied by the EEOC. *See* letter to Judge Hungate from Richard W. Schuetz dated April 7, 1989 (noting issuance of letter of violation to the state of Missouri in connection with Missouri Plan judges that are subject to retention elections). Nor is the EEOC's reasoning thorough; its construction of the "elected to public office" exemption was expressed in dictum in a footnote to the EEOC Opinion Letter. Therefore the EEOC's construction of the exemption in that letter is entitled to considerably less deference than might normally be accorded to such determinations. *See INS v. Cardoza Fonseca*, 480 U.S. 421, 446 n.30 (1987). If any EEOC position is to be credited, it should be the more recent, 1989 determination that appointed Missouri judges are entitled to ADEA protection.

In addition to the plain language of the statute as a basis for Judge Hungate's conclusion that petitioners are not "elected to public office," the Missouri statutory scheme also establishes that petitioners are not candidates for "elective office." The applicable Missouri law provides: "except as otherwise provided in this subchapter, all candidates for *elective office* shall be nominated at a primary election in accordance with the provisions of Sections 115.339 through 115.405 of this subchapter." Mo. Rev. Stat. § 115.339 (1986). The only other provision for the nomination of a candidate "for elective office" is the mechanism for nomination of an independent candidate. *See* Mo. Rev. Stat. § 115.321 (1986). As appointed state judges under the Missouri Plan, petitioners fall within neither category and therefore are not candidates for "elective office" under Missouri law.[2]

Perhaps the most significant proof that Missouri Plan judges are not "elected to public office" is found in the Missouri constitutional provision governing political activity by judges. That section provides that "[n]o judge of any court in this state, appointed to or retained in office in the manner prescribed in §§ 25(a)-(g), shall directly or indirectly ... take part in any political campaign." Mo. Const. art. V, § 25(f).

In light of the fact that Missouri Plan appointed and retained judges may not be a candidate for "elective office" under Missouri law and may not take part in any political campaign, in light of the different

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[1] A copy of the EEOC letter to Judge Hungate, which notes the issuance of a Letter of Violation, is reprinted as an appendix to this brief. *See* correspondence filed in the district court record and dated 3/31/89, 4/12/89, 5/5/89 and 5/9/89 in the district court docket sheets.

[2] The distinctions between a "question" and an opposed, partisan election offer further proof that Missouri Plan judges are appointed and not elected. A "question" is "any measure on the ballot which can be voted 'yes' or 'no'." Mo. Rev. Stat. § 115.013(22) (1986). Missouri Plan judges are subject to the *question* of retention. Mo. Const. art. V, § 25(b). While only a "*candidate* for *election* to any office may challenge the correctness of the returns for the office," Mo. Rev. Stat. § 115.553(1); *see State ex rel Bushmeyer v. Cahill*, 575 S.W.2d 229 (Mo. Ct. App. 1987); only voters may challenge the results of any "question." Mo. Rev. Stat. § 115.553(2). *See* Mo. Rev. Stat. § 115.555 (specifying procedure for contests "on *questions* relating to the retention of Missouri Plan judges"). Apparently, a Missouri Plan judge may not even challenge the result of a retention question involving his or her own retention, except perhaps as a voter. *See* Mo. Rev. Stat. §§ 115.553, 115.555. *Cf.* Mo. Const. art. V, § 25(f) (appointed judges are prohibited from taking part in any political campaign).

challenge procedures for "elections" as opposed to "questions," and in light of the issuance of a Letter of Violation to the state of Missouri by the EEOC, Judge Hungate surely was correct in ruling that petitioners were not "elected to public office" within the meaning of the ADEA exemption of 29 U.S.C. § 630(f).

III. WHEN CONGRESS DRAFTED THE EXEMPTIONS FROM THE ADEA DEFINITION OF "EMPLOYEE," IT REASONABLY DISTINGUISHED THE GROUP COMPRISED OF ELECTED OFFICIALS, THEIR SUPPORTING STAFF, APPOINTEES AND ADVISERS FROM OTHER STATE EMPLOYEES.

Respondent argues that Congress could not have intended for appointed judges to be "employees" under the ADEA, because that construction of the statute would lead to the "irrational" result of appointed judges being protected under the ADEA, while elected judges are not. Brief for the Respondent at 13-15. Respondent's argument is not well taken for several reasons.

First, the argument errs in focusing upon elected versus appointed *judges*, when the distinction that Congress made was between elected versus appointed *officials*. "Any perceived imprudence in this dichotomy is a matter to be addressed to Congress." *EEOC v. Vermont*, 904 F.2d 794, 801 (2d Cir. 1990). Second, respondent's argument ignores Senator Ervin's stated intention for distinguishing between elected officials and other state employees: that exempting elected officials was necessary to avoid the possibility that an election could be challenged based upon impermissible motives on the part of the voters. 118 Cong. Rec. 4096 (1972) (statement of Sen. Ervin), *quoted in* Brief of the National Governors' Association at 10 n.9. The additional exemptions allowed an exempted elected official to pick his own team for his family of close advisers. *See* 118 Cong. Rec. at 4097 (1972) (Statement of Sen. Ervin). This distinction is rational and justifies a distinction between exempt elected officials and non-exempt appointed officials, even if they might be similarly situated as to job responsibilities. Third, and most significant, Missouri itself recognizes a distinction between elected and appointed judges and has made

a conscious choice to elect some judges and to appoint others. If Missouri can make the distinction, Congress can surely act on the same distinction in regulating one and not the other.

While it may seem peculiar that Missouri Plan judges would be protected under the ADEA while other elected judges in Missouri would not, the peculiarity is not a result of a misapplication of the statute or a misunderstanding of Congressional intent; it is the direct result of Missouri's unusual, bifurcated judicial selection system and its provision for the appointment of some judges and the election of others. While it may seem anomalous that an elected Missouri judge and an appointed Missouri judge could be treated differently under the ADEA, the anomaly arises not from any irrationality in petitioners' reading of the statute's plain language, but instead arises from the differing methods for selecting judges under Missouri law.

IV. IN "UNMISTAKABLY CLEAR" LANGUAGE CONGRESS EXPRESSED ITS INTENTION TO APPLY THE ADEA TO THE STATES AND TO REGULATE THE STATES' EMPLOYMENT RELATIONSHIP WITH STATE EMPLOYEES, INCLUDING JUDGES.

Both respondent and several amici assert that the extension of ADEA coverage to petitioners and other similarly situated state court judges intrudes on a traditional area of state sovereignty; accordingly, so the argument goes, it should not be presumed without an "unmistakably clear" statement — which respondent and amici contend is lacking — that Congress intended to displace or preempt state laws or constitutional provisions that regulate state judiciaries. Brief For The Respondent at 26-28; Brief For Amici Curiae Colorado, Florida, Hawaii, Massachusetts, et al. at 6-10 (hereinafter "Brief For Massachusetts"); Brief Of Amicus Curiae State of Vermont at 5-8, 10-13 (hereinafter "Brief Of Vermont").

To the extent that Respondent and amici are indicating that Congress did not clearly and unmistakably state its intention that the ADEA was to apply to the states as states, respondent and amici are plainly and simply incorrect. To the extent that respondent and amici are attempt-

ing to extend the "clear statement" rule to require an additional clear statement of all the factual possibilities and ramifications of applying a particular piece of legislation to the states, such an extension is unwarranted both under this Court's precedents and as a matter of policy.

In defining those persons or entities who were to be regulated under the ADEA, Congress stated its intention to regulate the states in plain and unmistakable language: "The term 'employer' means ... a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State ...." 29 U.S.C. § 630(b). The ADEA was made applicable to the states in 1974 by an amendment that inserted this specific, "unmistakably clear" language. The same amendment deleted statutory text that previously had *excluded* the states from coverage under the ADEA. Pub. L. 93-259, § 28(a), 88 Stat. 55, 74 (1974). Congress could not have been clearer in stating its intention to regulate the states as states under the ADEA.

Respondent's clear statement argument has previously been addressed and rejected by this Court's holding that the ADEA itself seeks to regulate the states as states. *See EEOC v. Wyomi*ng, 460 U.S. 226, 237 (1983) ("the first requirement — that the challenged federal statute [the ADEA] regulate the 'States as States' — is plainly met in this case"). *See also Fitzpatrick v. Bitzer*, 427 U.S. 445, 457 (1976) (extension of Title VII to the states, based on language identical to that in the ADEA, constituted a clear statement necessary to abrogate the Eleventh Amendment); *Davidson v. Board of Governors*, 920 F.2d 441, 443 (7th Cir. 1990) (Posner, J.) (with respect to ADEA, Congress "could not have made its desire to override the states' sovereign immunity clearer").

Ironically, respondent defeats his own argument, that Congress did not clearly state its intent to regulate the states, when he calls for this Court "to again embrace the balancing test of *National League of Cities v. Usery*." Brief for the Respondent at 36. Like the Fair Labor Standards Act in *National League of Cities*, however, the ADEA "seeks to regulate directly the activities of states as public employers," *see National League of Cities v. Usery*, 426 U.S. at 841, and spoke "directly to the States *qua* States." *See id.* at 847. *Compare* 29 U.S.C. § 203(e)(2) (FLSA applies to individuals employed by a state or political subdivision thereof, except for certain specified, exempted employees) *with* 29 U.S.C. § 630(b) (ADEA applies to individuals employed by a state or political subdivision thereof, except for certain specified, exempted employees who fall into the same general exceptions as in the FLSA). *National League of Cities* would be applicable *only* because the challenged statute in this case, the ADEA, like the FLSA, *sought to regulate the states as states*.

With respect to the second part of respondent's clear statement argument — that Congress needs to make a clear statement not only that it intends to regulate the states as states, but also that it intends to regulate the states as states in connection with their employment of judges — respondent offers no case law or other support for this unwarranted extension of the "clear statement" cases. Such a requirement is inherently unworkable and would force Congress to draft long and detailed lists of which particular state functions and employees it meant to regulate. While *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985), may have required "unmistakably clear" language of Congress' intention to abrogate the States' immunity from suit in federal court, this Court has never required that the clear statement of Congressional intent indicate each potential, factual application of the legislation upon the states. All that this Court has heretofore required is a statement in the statute itself that is sufficiently clear to enable a court to answer "yes" or "no" to the question "did Congress clearly express its intention to regulate the states?"

Respondent offers no reasonable basis for extending the clear statement rule to require a clear statement of all possible applications of the regulation of the states by Congress. Moreover, if respondent is advocating that a clearer statement of specific applications of federal legislation is only needed in particularly "intrusive" regulations of the states, it offers no test for determining which applications of a particular statute to the states will require a clear statement.

In reality, respondent's advocacy of a detailed, "especially clear statement" requirement appears to be little more than an attempt to

resuscitate *National League of Cities*' restraints on federal regulation of the states by another means. Such questions about the power of Congress to regulate the states should be addressed directly, however, and not indirectly through an unwieldy extension of the clear statement rule in a way that is as unworkable as it is illogical. Requiring a clear statement of an intent to regulate the states is one thing; avoiding questions about the *power* of Congress to regulate the states, by judicially imposing a standardless and vague requirement of an "especially" clear statement of particular applications under a statute that clearly regulates the states, is quite another thing. The former is already required under the "clear statement" cases, and Congress has made the requisite statement in the ADEA. The latter is not required by the Tenth or Eleventh Amendments, the Guarantee Clause or any other constitutional notions of "federalism."

V. NEITHER THE TENTH AMENDMENT NOR GENERAL PRINCIPLES OF FEDERALISM PROSCRIBE APPLICATION OF THE ADEA TO STATE JUDGES.

Respondent and several amici argue that a state has a right, apparently unqualified, to prescribe the qualifications of its officers. Brief for the Respondent at 28; Brief of Vermont at 6, 10, 15; Brief for Massachusetts at 30. According to respondent, Congressional invalidation of state constitutional provisions mandating the retirement of state judges under the ADEA allegedly intrudes improperly "upon the ability of the state to provide the terms and conditions of employment of their own officials." Brief For The Respondent at 37. Therefore, respondent argues for the first time, in this Court or any other court, that the Tenth Amendment and notions of federalism operate to limit the constitutional reach of the ADEA, at least as applied to appointed state judges. *Id.* at 33-37.

Preliminarily, by *never* raising this issue in *any* court, respondent has waived his right to make a Tenth Amendment or other claim based upon principles of federalism. This claim has been waived, is not properly before this Court and should be rejected out of hand. *See General Utilities & Operating Co. v. Helvering*, 296 U.S. 200, 206 (1935). Unlike the "elected to public office" defense which respondent raised in the district court but which was not relied upon in the court of appeals, respondent *never* raised a Tenth Amendment or federalism argument at any stage of this litigation.[3]

Substantively, respondent's Tenth Amendment defense is without merit under both existing law, *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985), as well as *National League of Cities v. Usery*, 426 U.S. 833 (1976), the case that was overruled by *Garcia*. Initially, respondent analyzes his federalism claim under *Garcia* and argues that the "national political processes worked in a defective manner" and therefore rendered Congress' regulation of state activities under the ADEA invalid under the Tenth Amendment. Brief For The Respondent at 35 (citing *South Carolina v. Baker*, 45 U.S. 505 (1988)). This conclusory allegation is insufficient to show that the national political process was defective when Congress amended the ADEA and extended its application to the states in 1974, or when Congress raised and eventually eliminated the upper age limits on the protected class in 1978 and 1986.

Respondent contends that the political processes failed because Congress did not understand that state judges might be implicated by extension of ADEA coverage to the states and removal of the ADEA's upper age limit. Brief For The Respondent at 34. It is presumed, however, that legislators know the existing law when they pass legislation, *Miles v. Apex Marine Corp.*, ____ U.S. ____ 111 S. Ct. 317, 325 (1990); *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979), and it therefore is beyond question that the representatives and senators in Congress knew the method of selecting the state judges in their home states at the time that each of the ADEA amendments were enacted. *See id.* When Congress applied the ADEA to the states by amending it in 1974, thirty-six states appointed judges on at least one level of their judiciary. *See* Note, *Mandatory Retirement Of Appointed*

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[3] Most significantly, respondent failed to raise the issue in this Court in opposition to the petition for certiorari. Only *after* petitioners filed their brief in chief did respondent raise this new constitutional issue. Respondent's dilatory conduct has had a prejudicial effect upon petitioners' ability to brief this issue in sufficient detail at this stage of the proceedings.

State Judges: Balancing State and Federal Interests, 25 Val. U.L. Rev. 125, 146 n.148 (1990) (hereinafter "*Mandatory Retirement of Appointed State Judges*") (citing *Council Of State Governments, The Book Of The States*, Table 5 (1972-73)). Therefore, given (1) Congress' knowledge of the varying methods for selecting state judges and (2) the lack of any procedural defect in the legislative process that amended the ADEA, application of the ADEA to regulate the states and their employment relationship with certain state employees, in this case judges, is constitutional under *Garcia*.

Respondent also avers that "[t]here is no doubt that under *National League of Cities* an express or implied attempt to preempt a state constitutional provision providing for the retirement of state-court judges at seventy would have been invalidated." Brief For The Respondent at 33-34. To the contrary, there is *considérable doubt* about whether regulation of state court judges under the ADEA would be invalidated if this Court overruled *Garcia* and returned to the *National League of Cities* test.

This Court applied the *National League of Cities* test when it *upheld* the constitutionality of applying the ADEA to the states in *EEOC v Wyoming*, 460 U.S. 226 (1983). For respondent to claim that the ADEA's application to state judges is unconstitutional under *National League of Cities*, he would have to show that the ADEA is unconstitutional *as applied* in this case. To do so, respondent would have to establish (1) that the ADEA "regulates the 'States as States,'" (2) that the ADEA addressed "matters that are indisputably 'attribute[s] of state sovereignty,'" and (3) that Missouri's non-enforcement of its Mandatory Retirement Provision against state judges would "directly impair" its ability "'to structure integral operations in areas of traditional governmental functions.'" *See EEOC v. Wyoming*, 460 U.S. at 237 (quoting *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 287-88 (1981)).

Although the ADEA clearly regulates the states as states and thereby satisfies the first prong of the *National League of Cities* test, it is not at all clear that either of the other two prongs would be satisfied in this case. In *EEOC v. Wyoming* this Court did not address the second

prong because it found that the third prong was not satisfied. Although the Court acknowledged that management of state parks was a "traditional state function," it also found that requiring the retirement of state game wardens, based on inability to perform rather than an arbitrary age limit, would not directly impair the state's ability to "structure integral operations." Such impairment would only be found if the federal intrusion threatened Wyoming's "separate and independent existence." 460 U.S. at 239.

Similarly, the ADEA's requirement that Missouri not discriminate arbitrarily against its appointed judges on the basis of age poses no threat to Missouri's separate and independent existence. Allowing Missouri's judges to continue to work as long as they are capable would not cost the state any more money. Any reasons that Missouri may have as a basis for its mandatory retirement provision could be met by less restrictive alternatives, such as limiting the terms of its judges or using its existing constitutional provision for the retirement, removal and discipline of judges. *See* Mo. Const. art. V, § 24. Application of the ADEA to Missouri's judges does not threaten Missouri's separate and independent existence.

The second prong of the *National League of Cities* test would also not be met. Although prescribing the qualifications of its own judiciary might seem to be an "indisputable attribute of state sovereignty" at first blush, Missouri has neither an indisputable sovereign right to invidiously and arbitrarily discriminate based on age, nor is its existence threatened by a regulation that merely allows its appointed judges to continue working so long as they are capable.

Respondent's Tenth Amendment argument is deficient in another major respect, even assuming that *Garcia* were overruled as respondent advocates. The ADEA was passed under two sources of constitutional authority, the Commerce Clause, U.S. Const. art. 1, § 8, Cl. 3, and the enforcement clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 5. *Davidson v. Bd. of Governors*, 920 F.2d 441, 443 (7th Cir. 1990); *Ramirez v. Puerto Rico Fire Service*, 715 F.2d 694, 698-700 (1st Cir. 1983). *See EEOC v. Wyoming*, 460 U.S. 226, 243 (1983) (leaving open the question whether the ADEA was enacted

pursuant to enforcement authority of § 5 of the Fourteenth Amendment).

Section 5 of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. Congressional under § 5 power to legislate and thereby to enforce the Equal Protection Clause in § 1 of the Fourteenth Amendment is not limited by the Tenth Amendment. *EEOC v. Wyoming*, 460 U.S. at 243 n.18; *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 287 n.28 (1981). The legislative history of the ADEA, though not extensive, supports the conclusion that Congress understood in 1974 that extension of the ADEA to state and local government employers was supported by both the Commerce Clause and section 5 of the Fourteenth Amendment. *See generally Ramirez*, 715 F.2d at 698-700; *Arritt v. Grisell*, 567 F.2d 1267, 1270-71 & n.11 (4th Cir. 1977); *EEOC v. County of Calumet*, 519 F. Supp. 195, 198-200 (E.D. Wis. 1981).

Congress first considered extending the ADEA to cover state and local government employers in 1972, when it amended Title VII of the Civil Rights Act of 1964 to cover state and local government employers in the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(f), 86 Stat. 103, 42 U.S.C. § 2000(e)(f)). *See* 118 Cong. Rec. 7745-46 (1972) (remarks of Sen. Bentsen); S. Rep. No. 92-842, 92d Cong., 2d Sess. 45-46 (1972).

> There is no dispute that in enacting the 1972 amendment to Title VII to extend coverage to the States as employers, Congress exercised its power under § 5 of the Fourteenth Amendment. *See, e.g.*, H.R. Rep. No. 92-238, p. 19 (1971); S. Rep. No. 92-415, pp. 10-11 (1971).

Fitzpatrick v. Bitzer, 427 U.S. 445, 453 n.9 (1976). Respondent virtually concedes that the employee exemptions of Title VII, which are identical to the ADEA, could be constitutionally applied against Missouri to prevent discrimination against its appointed judges. Brief For The Respondent at 22-23. Given the similarity between Title VII and the ADEA, as well as the many references in Congress that indicates a perception of arbitrary discrimination based on age as being

"invidious" and comparable to discrimination based on race, sex, religion, or national origin, [4] it is apparent that Congress believed that the 1974 amendments to the ADEA were quite plainly supported by § 5 of the Fourteenth Amendment. *See* S. Rep. No. 93-690, 93rd Cong., 2d Sess. 55 (1974); H.R. Rep. No. 93-913, 93rd Cong., 2d Sess. 40 (1974). Both of these committee reports quote with approval the following passage from the President's statement recommending the legislation:

> Discrimination based on age — what some people call 'age-ism' — can be as great an evil in our society as discrimination based on race or religion or any other characteristic which ignores a person's unique status as an individual and treats him or her as a member of some arbitrarily-defined group. Especially in the employment field, discrimination based on age is cruel and self-defeating; it destroys the spirit of those who want to work and it denies the Nation the contribution they could make if they were working.

Id.

In light of statements like these in the ADEA legislative history, Congress' enactment of the ADEA was appropriate legislation under § 5 of the Fourteenth Amendment to enforce upon the states the protections of the Equal Protection Clause in § 1 of the Fourteenth Amendment. *See City of Rome v. United States*, 446 U.S. 156, 177 (1980); *Katzenbach v. Morgan*, 384 U.S. 641, 650-51 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301, 324-27 (1966). The ADEA merely constitutes "appropriate legislation" to enforce the Equal Protection Clause and eliminate arbitrary, invidious age discrimination.[5] It does not prohibit all discrimination

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[4] *See generally Mandatory Retirement of Appointed State Judges*, 25 Val. U.L. Rev. at 132 n.47 and accompanying text.

[5] The fact that age-based classifications are not subject to strict scrutiny under the Equal Protection Clause does not mean that they are not a proper subject for Congress' enforcement authority under § 5 of the Fourteenth Amendment. A totally irrational state practice based on age (*e.g.*, prescribing the death penalty for anyone over the age of 50 convicted of a felony of any kind) would surely be struck down under the Fourteenth Amendment; age-based practices are therefore a proper subject of both Equal Protection Clause scrutiny and Congress' enforcement powers.

based on age, just that which is unreasonably arbitrary and which cannot be justified as a "bona fide occupational qualification." *See* 29 U.S.C. § 623(f)(1). Respondent's argument that the ADEA's application to state judges is precluded by the Tenth Amendment and principles of federalism must therefore fail, because the ADEA is appropriate legislation under Congress' enforcement powers under § 5 of the Fourteenth Amendment.

VI. MISSOURI'S ARBITRARY AGE DISCRIMINATION AGAINST ITS JUDGES IS IRRATIONAL AND SHOULD BE INVALIDATED UNDER THE FOURTEENTH AMENDMENT.

Respondent does not discuss in any detail the case that is the linchpin of petitioners' equal protection claim, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). Instead, respondent recites that old age is not defined "as a distinct, insular group for due process and equal protection analyses," and that policies relating to age "do not impermissibly interfere with the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class." Brief For The Respondent at 38. Respondent's equal protection analysis fails to recognize, however, that while classifications based on age may not be entitled to strict scrutiny, they nevertheless operate to classify a discrete and insular group with immutable characteristics, and such legislation is not automatically rational. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) ("prejudice against discrete and insular minorities ... may call for a correspondingly more searching judicial inquiry"). *Cf. City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 445-46 (1985) (recognizing the aged, the disabled, the mentally ill and mentally retarded as discrete groups with immutable disabilities and "who can claim some degree of prejudice from at least part of the public at large").

Respondent argues that *Vance v. Bradley*, 440 U.S. 93 (1979), is "fatal" to petitioners' position. Brief For The Respondent at 42-43. First, *Vance v. Bradley* is distinguishable because the foreign service officers who challenged a mandatory retirement provision in that case

were required to endure demanding physical challenges and conditions, unlike judges. 440 U.S. at 98. *See* Brief For The Petitioners at 29 n.16. Second, more than a decade has passed since the decision in *Vance v. Bradley*, and "the legislative facts on which the classification [in that case was] apparently based" can no longer "reasonably be conceived to be true." 440 U.S. at 111. Over time, laws based on antiquated notions and prejudices become irrational, although they once might "reasonably [have been] conceived to be true." Thus, the ordinance classifying the mentally retarded fell in *Cleburne*. 473 U.S. at 445-48. Missouri's mandatory retirement provision, which is similarly based on antiquated notions and unfounded prejudices against the aged, must also fall in this case.

Classifying people arbitrarily based upon their age classifies them immutably; just as there is no changing one's race or sex, one cannot "turn back the clock." Since the decision in *Vance*, Congress has entirely eliminated the age seventy cap on the protected class in the ADEA, in recognition of the increasingly overwhelming evidence that advancing age does not correlate with declining ability. *See* Brief Amicus Curiae Of American Association Of Retired Persons at nn.20-26, 29-38 and accompanying text. Statutes that *arbitrarily* discriminate based on age can no longer be presumed rational and should be invalidated.

Respondent alleges that he has never contended "that persons over the age of 70 are naturally unfit to judge." Brief For The Respondent at 44. Yet in the same brief, as rational bases for the mandatory retirement of Missouri's judges, respondent cites an attempt to retain "only those judges" who have "vigor, health and vitality," *id.* at 38-39 (quoting *O'Neil v. Baine*, 568 S.W.2d 761, 766 (Mo. 1978) (en banc)), and the "know[ledge] that age seventy is an age ... which is recognized by society as being 'about' the time when the physical and mental processes weaken among many men and women." *Id.* at 40 (again quoting *O'Neil v. Baine*). *See also* Brief For The Petitioners at 27 n.14 (quoting Respondent's Interrogatory Answer, which refused to identify any persons with knowledge of the state's rational basis for its mandatory retirement provision because such knowledge "is a matter

of *good common sense and an understanding of the vicissitudes of life and the aging process*").

Respondent does not attempt to distinguish *Cleburne* other than to state in conclusory fashion that the challenged statute therein "was wholly irrational," while the mandatory retirement provision challenged here "is not." Brief For The Respondent at 43. As stated in the Brief For The Petitioners at 27-31, the rational bases advanced by respondent, other than that asserting a decline in some judges' physical and mental ability after age seventy, are irrational under *Cleburne*. Respondent's remaining "rational" basis for the mandatory retirement of judges at age seventy, the elimination of judges who may be declining in physical and mental ability, actually operates to select so few judges of declining ability as to be irrational. As a winnowing tool, Missouri's mandatory retirement provision throws out a bushel of wheat with every cup of chaff.

VII. CONCLUSION

For the foregoing reasons petitioners respectfully request that this Court reverse the Eight Circuit judgment on the ADEA claim, vacate the judgment on the equal protection claim, and remand for the reasons set forth in the Brief For The Petitioners.

DATED this 11th day of March, 1991.

Respectfully submitted,

Thomas J. Guilfoil
Jim J. Shoemake
Bruce Dayton Livingston
Counsel of Record
Guilfoil Petzall & Shoemake
100 North Broadway, Suite 2000
St. Louis, Missouri 63102
(314) 241-6890

Attorneys for Petitioners

APPENDIX

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APPENDIX A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
CENTRAL WEST PLAZA BLDG. 5TH FLOOR
625 NORTH EUCLID
ST. LOUIS, MISSOURI 63108

April 7, 1989

Honorable William L. Hungate
United States District Court
Eastern District of Missouri
1114 Market
St. Louis, MO 63101

Re: Civil Action No. 88-0221C(3)
Gregory et al v. Ashcroft

Dear Judge Hungate:

The Equal Employment Opportunity Commission handled a directed investigation of the issues of mandatory retirement of appointed state court judges, as well as the issue of penalizing judges who fail to retire, under the case number 280890210, entitled *Directed v. State of Missouri*. During the processing of that case, our investigator, Maria Schulte, telephoned Michael Boycourt [sic] to ascertain whether the state was interested in settlement discussions. Mr. Boycourt [sic] declined to discuss settlement and stated a number of reasons.

Thereafter, the Commission issued its Letter of Violation and made one further effort to inform the state that settlement was available. Mr. Boycourt [sic] declined settlement again, stating a number of additional or different reasons.

When the charges of the plaintiffs were received by the Commission, the Commission notified the state of the charges, provided copies, and asked that the state submit responses to the charges by January 31, 1989, along with whatever supporting documentation was available. No responses have been received.

In light of the earlier charge and this lawsuit, these charges were administratively closed so that the litigation could continue, since more than sixty days had elapsed from their filing.

If I can be of further assistance, please do not hesitate to contact me.

Very truly yours,

/s/ Richard W. Schuetz
Enforcement Manager